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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON JOHNSON, Defendant and Appellant.	B200452 (Los Angeles County Super. Ct. No. BA303533)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose Sandoval, Judge. Affirmed.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

After a mistrial was declared due to the excusal of a juror and alternate juror, a second jury convicted Jason Johnson (defendant) of second degree murder and found true the allegation that he had personally used a deadly and dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)(1).[1] The trial court found true the allegations that defendant had suffered three prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to 15 years to life for the murder, a consecutive one-year term for the weapon enhancement, and three consecutive one-year terms for the prison prior enhancements. Defendant's total sentence was 19 years to life.

Defendant appeals on the grounds that the trial court's excusal of two jurors and subsequent declaration of a mistrial was not a legal necessity under the California rule nor a manifest necessity under the federal rule, and the discharge of the entire jury panel operated as an acquittal of all charges, barring trial.

FACTS

During the early evening of May 16, 2006, Carly Rice (Rice), a heroin user, was asked to act as a lookout for defendant. They were in the area of Sixth Street and Towne Avenue in Los Angeles, which was an area known for drug transactions. As Rice acted as lookout, she heard a scuffle behind her. She turned and saw her friend Tomas bleeding from the head. She also saw Ernest Ortiz (Ortiz) run past her into the street. She thought he looked frightened. She then saw him fall to the ground. Rice saw that defendant had blood on his shirt and appeared agitated. Rice left the area with Tomas to try to find help for him. Later that evening, Rice saw defendant, but he had no blood on his clothes.

Jacqueline Kuindersma (Kuindersma), another heroin user, spent part of the day with Ortiz on May 16. When they began arguing on the corner of Sixth Street and Towne, Kuindersma walked away. As she did so, she heard someone arguing behind her.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

She turned and saw a group of people in a fight. Defendant and Ortiz were fighting each other. Kuindersma saw defendant hit Ortiz in the stomach with a shiny object two or three times.

Robert Cruz Diaz (Diaz) was standing on Crocker Street at approximately 5:15 p.m. on May 16. He saw Ortiz stumble and then collapse. Diaz approached Ortiz and saw he was having difficulty breathing. He and another man turned Ortiz over and saw he was losing color in his face. The other man opened Ortiz's shirt, and Diaz saw a puncture wound on Ortiz's chest. Diaz flagged down a police car, and one of the officers called paramedics. An autopsy revealed that Ortiz died of a stab wound to his chest that incised his heart.

DISCUSSION

I. Pertinent Proceedings Below

The trial court began voir dire by asking prospective jurors to answer questions posted on a board. The questions asked for place of residence, marital status, occupation, spouse's occupation and any prior jury experience. Prospective Juror No. 54, who later became the lone alternate, responded and interacted with the trial court as follows:

"Prospective Juror No. 54: I live in Lynwood. I am married, I work at a store.

"The Court: What do you do?

"Prospective Juror No. 54: Associate.

"The Court: May I ask what store?

"Prospective Juror No. 54: Ross.

"The Court: Ross. Okay.

"Prospective Juror No. 54: And I am married. My husband works in the garden.

"The Court: He is a gardener?

"Prospective Juror No. 54: Uh-Huh.

"The Court: Have you been on a jury before, Ma'am?

"Prospective Juror No. 54: No."

Prospective Juror No. 35, who later became Juror No. 12, answered the questions and interacted with the trial court as follows:

"Prospective Juror No. 35: I live in El Monte. I am married, retired, my wife stays home. Prior experience, I never finished a case. I was always dismissed.

"The Court: Okay. What did you do, sir, prior to becoming retired?

"Prospective Juror No. 35: I worked for an advertising company painting billboards.

"The Court: Which Company?

"Prospective Juror No. 35: At the time it was Foster and Kleiser.

"The Court: The reason I asked, my father was involved in that industry. That is why I asked. Thank you, Juror Number 35."

At one point, Prospective Juror No. 35 replaced a challenged juror and became Juror No. 12. The jury was subsequently accepted by both parties. The trial court asked the parties if they would stipulate to two alternates from among the remaining jurors, and the parties could agree only on Prospective Juror No. 54. The trial court stated, "Let's do this. I will go with one alternate, 54, and I will see what we got." The trial court then asked all the jurors to rise and stated that Prospective Juror No. 54 would serve as an alternate. The clerk swore in the jurors. The trial court announced to the jury that there would be a 15-minute break.

After the break, the trial court told counsel that the single alternate had approached the bailiff and said she was having trouble understanding him. The trial court stated, "She doesn't speak terribly good English. Frankly, my notes are inconsistent with that. I don't know what counsel's remembrance was . . . . However, I am not—I do—I have to take a person at face value in terms of their ability to understand everything. It is my intent to dismiss her based on that ground. Counsel, want me to voir dire her on her ability to speak English, I am happy to do that. Counsel requesting that?" Both parties said they were not requesting voir dire. The trial court stated that they would be left without an alternate, and that was a concern. The trial court did not believe there was a

prohibition against its proceeding to select alternates. The parties agreed, and the trial court directed the clerk to bring in 10 potential alternate jurors as well as the sworn jurors.

The trial court informed the alternate juror that she was excused and told the jury that it was going to reopen voir dire for the limited purpose of choosing an alternate. The trial court spoke with Juror No. 9 regarding her possible need for a hearing device and, at that point, Juror No. 12 interjected, "I do have the problem of hearing. In fact, when the gentleman spoke – this lady, I didn't know what she said." He told the trial court that he also had another problem. In a long conversation he missed "the words and then by the time I catch up with it, I lost words. I don't feel comfortable about that. I was dismissed for two cases before in this court for the same reason."

The trial court stated that it had not noted this problem at voir dire, and Juror No. 12 stated that he answered the questions that he was asked. He insisted he was not trying to get out of jury duty and was there to serve, but he did not feel that he would do a good job. He stated his problem was with both hearing and understanding.

At sidebar, the parties agreed that Juror No. 12 had not explained why he had been dismissed from other cases. Defense counsel said, "I will stipulate." The trial court stated it could not in good conscience keep Juror No. 12 on the jury if he was missing every 20 words when he tries to catch up. Juror No. 12 joined the sidebar and confirmed that hearing was a problem and that he also had difficulty understanding words he was not used to or had never heard before. At that point, the prosecutor asked Juror No. 12 a question about bias, and the juror did not fully understand. When Juror No. 12 left the sidebar the trial court stated it believed it had to excuse him. When he asked if the defense would waive a mistrial, since the jury had been sworn, defense counsel stated he would waive. The prosecutor stated they could go forward with selecting an additional juror and an alternate if they obtained a personal waiver of a mistrial from the defendant, because the prosecutor believed the defendant technically had the right to a mistrial.

After defense counsel spoke to defendant, she reported that defendant initially said he did not want to waive the potential of a right to a mistrial and then later said "Okay, go ahead." Counsel continued, "And then just now, just before you called me up, he apparently changed his mind again and said he wished not to waive his right to a mistrial. Let's start tomorrow morning."

When the trial court asked the prosecutor, who had called her office, if she had learned anything, the prosecutor stated that her appellate department had suggested that the trial proceed with 11 jurors. The prosecutor believed that was problematic. The trial court stated that because the defendant was not willing to waive, it was going to declare a mistrial so as not to waste any more time and to do the trial once "absolutely right." The trial court intended to thank the jury and inform them that the procedure of criminal law required that a mistrial be declared. There was no objection.

As the court thanked the jurors, defense counsel interrupted and asked to approach. She informed the trial court that defendant "just said he would waive." The prosecutor said she was not comfortable with the waiver at that point, and the trial court agreed. The trial court further stated that because of the seriousness of the case it wanted "to cross every 't', dot every 'i'." A mistrial was declared and the jury was dismissed.

At the next proceeding, defense counsel objected to the court going forward with jury selection of a new panel and moved to dismiss based upon double jeopardy grounds. He argued that the court had declared a mistrial that was not due to any conduct by his client, and it was declared without his client's consent. The prosecutor summarized the prior proceedings and argued that the trial court had declared a mistrial by legal necessity and therefore there was no double jeopardy violation. The trial court stated that defendant's consent is not required in a mistrial due to legal necessity.

Defense counsel argued that "just because the court [finds good cause to dismiss a juror], does not necessarily mean that there is a legal necessity to deprive the defendant from the mistrial and a dismissal. . . . I think the court has to distinguish what is legal necessity in our case, whether 11 jurors is a legal necessity to not go forward with what

you know with that panel with that 11." Citing *Larios v. Superior Court* (1979) 24 Cal.3d 324 (*Larios*), defense counsel stated that '"the constitutional requirements must be read to authorize mistrials only where there is consent or where good cause amounts to legal necessity."' (See *Larios* at p. 333.)

The trial court stated, "It was that concern [inability to understand words followed by loss of entire portions of discussion] that gave me the basis of legal necessity. Here is a juror who was not going to be able to function, not for any reason other than his own—I don't want to be uncharitable because he was an honest man. He wanted to serve—due to his intellectual shortcomings or incapacity. I don't mean to be uncharitable. He was a straight-forward guy, wanted to participate and serve. Given the nature of this case, given the severity of this case, I certainly didn't want the juror only listening to a portion of the testimony serving as an operating juror. Regardless of how he may have been considered or what terminology we may have used at the time, I think that gave me the legal necessity sufficient to declare the mistrial without the defendant's consent." Defense counsel submitted, and voir dire commenced.

II. Defendant's Argument

Defendant argues he was clearly placed in jeopardy at the moment the first jury was sworn. Absent a finding that the discharge of the jury was caused by legal or manifest necessity, the dismissal of the entire panel operated as an acquittal, and the double jeopardy clause barred retrial.

Defendant contends that the record does not demonstrate that Juror No. 54's English-language skills were not sufficient to allow her to act as a juror. Also, the record does not demonstrate that Juror No. 12 did not possess sufficient intellect to act as a juror.

III. Relevant Authority

"The Fifth Amendment to the federal Constitution provides: 'No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .' The double jeopardy clause protects criminal defendants in three ways: '"It protects against a second prosecution for the same offense after acquittal. It protects against a second

prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' [Citations.]" (*People v. Massie* (1998) 19 Cal.4th 550, 563.) In a trial by jury, the United States Supreme Court has determined that a defendant is deemed to have been placed in jeopardy when the jurors have been impaneled and sworn. (*Crist v. Bretz* (1978) 437 U.S. 28, 38.) After that time, if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant consented to the discharge, or manifest necessity required it. (*Green v. United States* (1957) 355 U.S. 184, 188; *Wade v. Hunter* (1949) 336 U.S. 684, 689-690, citing *United States v. Perez* (1824) 22 U.S. 579.)

"Protection against double jeopardy is also embodied in article I, section 15 of the California Constitution, which declares that '[p]ersons may not twice be put in jeopardy for the same offense.'" (*People v. Fields* (1996) 13 Cal.4th 289, 297–298 (*Fields*).) Section 1023 "implements the protections of the state constitutional prohibition against double jeopardy . . . ." (*Fields*, *supra*, at p. 305.) That section provides that if a defendant "has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading . . . ." (§ 1023.) In California, the dismissal of the entire jury without a verdict operates as an acquittal unless the dismissal was mandated by "legal necessity," or the defendant consented to the dismissal. (See *People v. Hernandez* (2003) 30 Cal.4th 1, 5.)

California's requirement of legal necessity is akin to the federal manifest-necessity rule. (See *Fields*, *supra*, 13 Cal.4th at p. 300; *Paulson v. Superior Court* (1962) 58 Cal. 2d 1, 5.) There is no constitutional or statutory bar to retrial if there was a legal necessity for discharge of the jury panel. (*Paulson*, *supra*, at p. 5.) The doctrine of legal necessity is a stricter standard than the federal standard of manifest necessity. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 716–717 (*Curry*).)

Good cause to discharge a juror must be a demonstrable reality. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1158, disapproved on another point in *People v. Rundle* (2008)

43 Cal.4th 76, 151; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.) The decision whether to discharge a juror for good cause is reviewed for abuse of discretion. (*People v. Guerra*, *supra*, at p. 1158; *People v. Hart* (1999) 20 Cal.4th 546, 596.)

IV. Dismissal of Jurors Proper; No Double Jeopardy Violation

A. Prospective Juror No. 54 (Alternate Juror)

We agree with respondent that the respective dismissals of the two jurors must be analyzed separately, since they occurred at two different times, even though the interval between them was short. The record shows that the court addressed the parties and told them that the alternate did not speak "terribly good English," and that it was the court's intent to dismiss her on that ground. The court, speaking to defense counsel, offered to voir dire the alternate on her ability to speak English. The court stated it was "happy to do that." The trial court asked defense counsel if he was requesting that, and counsel replied, "Not I." The prosecutor also stated she was not requesting voir dire. Therefore, defendant cannot now argue, as he does in over eight pages of his opening brief, that the court failed to conduct a "probing inquiry" into the alternate's skill in English. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. Davidian* (1937) 20 Cal.App.2d 720, 727.) The California Supreme Court has made it clear that the defendant has an obligation to preserve by an adequate record any claim of error with respect to the discharge of jurors. (*People v. Holt* (1997) 15 Cal.4th 619, 656, [for trials commencing after finality of *Holt* opinion, an objection must be made in the trial court in order to preserve for appeal a claim of error in excusing a juror]; *People v. Earp* (1999) 20 Cal.4th 826, 892 [constitutional claims may be forfeited by failure to object on such grounds]; *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16 [same].) Defendant has waived any claim of abuse of discretion in dismissing the alternate juror.

Moreover, defendant was not "entitled as a matter of right to have an alternate juror sit on his case." (*People v. Compton* (1971) 6 Cal.3d 55, 60 (*Compton*).) Section 1089 provides that, when a case is likely to be a protracted one, the court, *in its discretion*

may direct the calling of alternate jurors. No stipulation is required from a defendant to proceed without alternate jurors. (*Compton*, *supra*, 6 Cal.3d at p. 61.) When the court dismissed the alternate juror it had no knowledge of the fact that Juror No. 12 would be bringing another juror issue before the court. When the court next proposed to select more alternates, it asked whether there was any opposition. Defense counsel agreed with the trial court that selection of more alternates would be appropriate. As noted previously, it was only after the court had finished its conversation with Juror No. 9 that Juror No. 12 spoke up and began relating his problems.

Thus we see that defendant waived the issue of the alternate juror's dismissal. Moreover, her dismissal was not an abuse of discretion, and it did not cause or contribute to the declaration of a mistrial. The trial court is not expected to be prescient. Therefore, the discharge of the alternate juror does not implicate defendant's protection under the double jeopardy clauses of the state and federal constitutions.

B. Juror No. 12

Defendant contends that the trial court dismissed Juror No. 12 without good cause and then dismissed the remaining 11 sworn jurors even though the dismissal was not mandated by legal necessity (under the California rule) or manifest necessity (under federal constitutional law), and defendant did not consent to the dismissal. Defendant asserts that, absent a finding that the discharge of the jury was caused by legal or manifest necessity, the dismissal of the entire jury operated as an acquittal, and the double jeopardy clause barred retrial. He maintains that the trial court erred when it impaneled a new jury and allowed the case to proceed to verdict after denying defendant's motion to dismiss on the grounds he had already been placed in jeopardy. Defendant argues that reversal of his conviction is mandated.

At the outset, we agree with respondent that defendant impliedly consented to the discharge of Juror No. 12 and the declaration of a mistrial. After Juror No. 12 explained the difficulties he was having, the trial court discussed the matter with the prosecutor and defense counsel. The trial court then questioned Juror No. 12 extensively about his

difficulties. The court stated it was not comfortable with keeping the juror, and it believed he had to be excused. When asked if defense counsel would waive a mistrial, counsel said, "I would. Yes, I will waive." Counsel reported to the court, however that defendant at first said he would not waive, then said he would, and then said again he did not wish to waive. Counsel said, "Let's start tomorrow morning." This implies that counsel was agreeing to the declaration of a mistrial and suggesting that juror selection begin anew on the following morning.

In any event, we believe there was good cause for the dismissal of Juror No. 12 and that the subsequent discharge of the entire panel and declaration of a mistrial constituted a legal necessity, despite the fact that criminal trials may proceed with 11 jurors.

The trial court's determination of whether "good cause" exists to dismiss a juror will be upheld on appeal if substantial evidence supports it. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1158; *People v. Beeler* (1995) 9 Cal.4th 953, 975.) It is well established that a dismissed juror's inability to perform the functions of a juror must appear in the record as a '"demonstrable reality"' and will not be presumed. (*People v. Lucas* (1995) 12 Cal.4th 415, 489.)

In this case, Juror No. 12's inability to hear and his diminished language skills, which would have hindered him from keeping up with the examination of witnesses, was a "demonstrable reality." Juror No. 12 admitted to both hearing and comprehension problems. He said that he missed words when someone spoke for a long time, and, by the time he caught up with what the speaker had said, he found he had missed more words. When he tried to understand what he had missed, he got further behind. Juror No. 12 stated he was not trying to get out of jury duty, but he felt he would not do a good job.

At side bar, the trial court stated that it could not in good conscience keep Juror No. 12 on the jury if he was missing "every 20 words" and then catches up. The court believed that Juror No. 12 would not be a meaningful participant in deliberations. The

court did, however, conduct further inquiry into the matter at the prosecutor's request. At sidebar, Juror No. 12 confirmed that he was having problems hearing, and "your conversation whatever you are saying, I pick up two, three words and then four or five, no." When he tried to "pick up" a word he did not understand, by the time he understood what it was, "you are gone." Juror No. 12 actually demonstrated this problem by giving a nonresponsive answer to the trial court's next question, which was "How often did that happen during the time we have been talking?" Juror No. 12 responded, "That is the reason I said I may not be a good juror." Juror No. 12 did not understand the prosecutor's question, "Are you saying you may have missed some of the questions, then that counsel and I were asking to determine, you know, whether you might have some bias in the case as well?" Juror No. 12 also seemed to confuse the words "device" and "advice."

After some further questioning, the trial court stated to counsel that it did not feel comfortable keeping the juror and believed he had to be excused. As stated earlier, defendant vacillated between waiver and refusal to waive, prompting the court to declare a mistrial. The trial court elaborated further on its decision at the motion hearing, stating that Juror No. 12 "didn't understand certain words, he simply wasn't understanding and could not process all the information that was being given to him. That was my concern, I didn't want a juror who didn't understand what was going on." The court later added, "[G]iven the severity of this case, I certainly didn't want the juror only listening to a portion of the testimony serving as an operating juror."

We reject defendant's contention that the trial court insufficiently questioned Juror No. 12 in order to ascertain the degree of his problem. The record shows that the trial court conducted an extensive inquiry. "The trial court retains discretion about what procedures to employ, including conducting a hearing or detailed inquiry, when determining whether to discharge a juror." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1159; *People v. Beeler*, *supra*, 9 Cal.4th at p. 989.) We find no abuse of discretion in the way the trial court conducted its inquiry.

Having determined that the trial court had good cause to dismiss Juror No. 12 and that the good cause was apparent, i.e., a demonstrable reality, we turn to the question of the discharge of the entire panel and the declaration of a mistrial.

As stated in *Curry*, *supra*, 2 Cal.3d at page 716, California provides its citizens a greater degree of protection against double jeopardy than that provided by federal law by placing limitations on what constitutes "legal necessity." Therefore, a finding of legal necessity under the California rule necessarily includes a finding of manifest necessity under the federal doctrine. "[L]egal necessity for a mistrial typically arises from an inability of the jury to agree [citations] or from physical causes *beyond the control of the court* [citations], such as the death, illness, or absence of judge or juror [citations] or of the defendant [citations]." (*Id*. at pp. 713–714.)

There was clearly a legal necessity for the mistrial, since Juror No. 12's deficiencies were a physical cause beyond the control of the court, and after his discharge the jury consisted of only 11 members. This court's opinion in *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624 (*Mitchell*) is instructive. After the first witness's testimony in that case, a juror named Rodriguez informed the court that he had overheard comments from one of the excused jurors. These comments were critical of trying a Black defendant by an all White jury. Rodriguez stated he had "laughed-off" the comments, and the trial court's inquiry of the other jurors revealed that no one had heard these remarks. (*Id*. at p. 626.) At the beginning of the next court session, Rodriguez sent the judge a note saying he had found his mind wandering and was unable to listen to what was being said. In chambers, Rodriguez said he had missed some of the evidence because he had "started judging him" and also because his mind was wandering. (*Ibid*.) The judge stated in open court that he found Rodriguez was "not able adequately to concentrate on the evidence or consider the evidence impartially . . . ." (*Ibid*.) The court found this constituted good cause to excuse Rodriguez and did not seek consent or objection from the defendant or his counsel. (*Id*. at pp. 626–627.) The judge asked the parties if they would stipulate to trial by 11 jurors, and defense counsel would not do so.

(*Id*. at p. 627.) The court then declared a mistrial, again without seeking consent or objection from the defendant or his counsel. (*Ibid*.)

The defendant subsequently entered a plea that he had been once in jeopardy because a mistrial had been declared without his consent and without legal necessity. (*Mitchell*, *supra*, 155 Cal.App.3d at p. 627.) In denying the petition, we reasoned that the case was "one where, upon good cause, the trial court found the juror *factually unable* to perform—as distinguished from merely declaring *legal disqualification*—based upon uncontradicted facts." (*Id*. at p. 629.) We did not rely at all upon the juror's acquired prejudice, but rather, the juror's inability to concentrate as the good cause resulting in legal necessity. (*Ibid*.) We noted that the trial court had, as in the instant case, expressly made a finding of the juror's inability to perform his duty, and substantial evidence supported that finding. (*Ibid*.)

As in *Mitchell*, we conclude that substantial evidence supports the trial court's express factual finding in the instant case that Juror No. 12 was not able to properly perform his duty. Therefore, the trial court did not err in declaring a mistrial.

We disagree with defendant's assertion that the trial court did not sufficiently explore the possibility of proceeding with only 11 jurors. A personal waiver or stipulation by a defendant is required to proceed with 11 jurors. (*People v. Patterson* (1959) 169 Cal.App.2d 179, 186–187.) When the prosecutor reasonably stated she was not comfortable with using 11 jurors because there were no alternates left, defense counsel said nothing. Defense counsel also made no comment or objections when the trial court responded, "I am going to do the following. He is not willing to waive. I didn't want to plant error. This is too important. We are going to do this once. I am going to be very careful. I am not absolutely certain. We are going to do a mistrial. I think I should. I don't like wasting time any more than any one of you. We are going to do this once absolutely right. I am going to be fair to both sides, explain to this jury—I am going to thank them, tell them the procedure of criminal law requires that I declare a mistrial and I will see you here Monday and we will start picking a new jury." The trial

court further stated, "Believe me, I hate wasting court time. This is a serious case. He is going to go to jail for a long time if found guilty. I want to cross every 't', dot every 'i'." Defense counsel's only comment was "I appreciate that."

As the prosecutor so aptly stated, the trial court did not wish to "get into an experimental area" by proceeding with 11 jurors. We believe this was wise, especially since defendant gave no indication he wished to proceed with 11 jurors. Moreover, both the trial court and the prosecutor recalled that the trial court had mentioned the possibility of using only 11 jurors to defense counsel. Unfortunately, it was not on the record. The trial court recalled it had stated during the prior proceeding that "he is not going to agree—the, defense counsel, is not going to agree to an 11-person jury. I believe defense counsel indicated that would be the situation." The prosecutor confirmed that that was her recollection as well.

Thus we see that the trial court's decision to declare a mistrial was a carefully reasoned one, as was its decision to dismiss Juror No. 12. In this case the trial court was rightfully concerned with the waste of judicial resources and the looming specter of a mistrial being declared after more time and energy had been invested in the case. As the court stated in *United States v. Campbell* (5th Cir. 2008) 544 F.3d 577, 581, when applying the federal standard, "manifest necessity" is intended to be flexible in order to determine whether a mistrial or some other option makes the most sense. As in that case, the trial court's decision here was neither "abrupt nor precipitate." (*Id*. at p. 583.)

Finally, we note that the court in *Curry* believed that the underlying principle in the protection against double jeopardy is to prevent the state from subjecting an accused to the "embarrassment, expense, and anxiety [that] would be visited upon an individual who is compelled to defend himself a second time because his original trial was aborted without his consent by a well-meaning but overly solicitous judge." (*Curry, supra*, 2 Cal.3d at p. 717, fn. omitted.) Such was not the case here, where voir dire had barely been completed and opening statements had not been given. We conclude the trial court had good cause to dismiss the two jurors, and defendant has failed to show that the

absence of legal necessity or manifest necessity to discharge the entire jury led to the violation of his rights under the double jeopardy clause.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST